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No. 90-1402

In the Supreme Court of the United States

OCTOBER TERM, 1990

ARTHUR C. EWING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners may recover the taxes and interest they paid pursuant to a Closing Agreement negotiated and executed by them under Section 7121 of the Internal Revenue Code when, after the payment was received, the Internal Revenue Service did not make an assessment of the taxes and interest set forth in the Closing Agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 914 F.2d 499. The opinion of the district court (Pet. App. B3-B34) is reported at 711 F. Supp. 265.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1990. A timely petition for rehearing, with suggestion for rehearing in banc, was denied on December 10, 1990 (Pet. App. C). The petition for a writ of certiorari was filed on February 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 7121 of the Internal Revenue Code of 1986, (26 U.S.C.), provides as follows:

> (a) *Authorization.* – The Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.
>
> (b) *Finality.* – If such agreement is approved by the Secretary (within such time as may be stated in such agreement, or later agreed to) such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact –
>
> (1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and
>
> (2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

STATEMENT

1. Petitioners filed federal income tax returns for the years 1976 through 1979 and paid the taxes indicated on their returns. The Internal Revenue Service audited those returns and proposed adjustments resulting in deficiencies. In connection with those audits, petitioners executed consents extending the time for the assessment of deficiencies to December 31, 1984, as authorized by Section 6501(c)(4) of the Internal Revenue Code.[1] Pet. App. A3-A6 & n.3.

[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code (26 U.S.C.), as amended and effective during the years involved.

After negotiating with representatives of the Internal Revenue Service, petitioners executed Closing Agreements on July 31, 1984, that resolved the adjustments and deficiencies that had been proposed. Two weeks later, the Closing Agreements were approved by the Commissioner pursuant to Section 7121(a).[2] On the next day, petitioners sent to the Internal Revenue Service their check in the amount of $258,956.18, with notations on the check indicating how the sum was to be applied to the taxes for the several years covered by the Closing Agreements. These amounts corresponded exactly with the deficiency amounts to which petitioners had agreed. Petitioners thereafter remitted additional checks to cover interest on the deficiencies. Pet. App. A4-A5.

2. Having received payment of the taxes due, the Internal Revenue Service did not make assessments of the amounts remitted by petitioners. When petitioners became aware that assessments had not been entered prior to December 31, 1984, the date to which the period for assessment had been extended, petitioners filed claims for refund of the sums they had paid under the Closing Agreement. After these claims were denied, petitioners instituted this action in the district court seeking to recover their payments. Pet. App A6.

Upon cross-motions for summary judgment, the district court entered judgment for petitioners in the amount of $333,641.17, the total amount of the deficiencies and interest paid pursuant to the Closing Agreements. Pet. App.

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[2] With respect to Closing Agreements, Section 7121 speaks in terms of agreements entered into by "the Secretary." But Section 7701(a)(11) provides that "[t]he term 'Secretary' means the Secretary of the Treasury or his delegate." Section 7701(a)(12) defines the phrase "or his delegate" to include officers or employees authorized "directly, or indirectly by one or more redelegations of authority, to perform the function mentioned."

B1-B2. Purporting to rely upon this Court's decision in *Rosenman* v. *United States*, 323 U.S. 658 (1945), the district court concluded that a tax could not be said to have been "paid" prior to assessment; until assessment, any remittance by the taxpayer was merely a deposit (Pet. App. B3-B30). The district court assumed that petitioners were therefore entitled to recover the amounts they had remitted under Section 6401 of the Code, which authorizes the recovery of payments of taxes that are either "assessed or collected" after expiration of the period for assessment. 26 U.S.C. 6401(a). While the court acknowledged that, under the terms of the Closing Agreements, petitioners had "effectively conced[ed] the amount of their additional liability," the court reasoned that their liability was conditioned upon "later assessment and collection by the IRS" (Pet. App. B30-31). Despite the fact that the terms of the Closing Agreements had been negotiated and accepted by petitioners, and had been approved after review by the Commissioner, the district court held that (Pet. App. B31-B32):

> The Ewings, as contracting parties, were entitled to the protection of having the IRS review their case more closely and make sure that the amounts listed on the forms as being the Ewings' additional obligations were not excessive.

3. The court of appeals reversed. Acknowledging that a minority of courts of appeals agreed with the district court's reading of *Rosenman* to the effect that a tax is not "paid" but is only "deposited" until it has been assessed (Pet. App. A13-A21),[3] the court announced that its own reading

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[3] *Thomas* v. *Mercantile Nat'l Bank*, 204 F. 2d 943 (5th Cir. 1953); *United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956). As the court pointed out, the panel that decided *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980), felt itself bound by *Thomas*, but expressed the opinion that it should be overruled. *Id.* at 361.

of *Rosenman* was otherwise, in accordance with the majority view that "payment" has the meaning attributed to it in ordinary usage and is not to be identified with, or dependent upon, assessment (Pet. App. A21-A24, citing, *e.g.*, *Ameel* v. *United States*, 426 F.2d 1270 (6th Cir. 1970); *Hill* v. *United States*, 263 F.2d 885, 886 (3d Cir. 1959); *Lewyt Corp.* v. *Commissioner*, 215 F.2d 518 (2d Cir. 1954), aff'd in part and rev'd in part on other grounds, 349 U.S. 237 (1955)). The court of appeals further observed that it saw "no indication of nor for that matter purpose in, the Ewings conditioning their agreement [to pay their admitted tax liability] on a timely assessment." Pet. App. A24. The tax having been paid, there was no need for assessment. The court thus held that (*ibid.*):

> the Ewings' remittances made in accordance with their Closing Agreements and related documents and received by the government prior to the closing of the assessment period were payments of tax which the government is entitled to retain.[4]

ARGUMENT

We acknowledge that, outside the context of Closing Agreements made under Section 7121 of the Code, a conflict exists among the courts of appeals on whether a voluntary payment made to extinguish an admitted tax liability must be accompanied by a timely assessment of taxes under Section 6501 to avoid a taxpayer's subsequent claim for a refund under Section 6401. We further acknowledge that

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[4] The court further held that Section 7121 does not override the provisions of Section 6401(a), and that petitioners therefore are entitled to recover the amount of interest they had paid after December 31, 1984 (Pet. App. A24-A28). While we disagree with that ruling, we have not sought review of it.

the court of appeals appears to have believed that this issue was properly before it. In fact, however, the court of appeals need not have addressed or considered that issue in this case.

Instead, this case is governed by the finality provisions of Section 7121(b) of the Code, which provide that any liability "determination" or "payment" made under a Closing Agreement "shall not be annulled, modified, set aside, or disregarded" in "any suit, action or proceeding." 26 U.S.C. 7121(b)(2).[5] The courts of appeals have consistently applied these finality provisions to prevent taxpayers from escaping the liability admitted by them in Closing Agreements. Because there is no conflict on this dispositive issue, further review is not warranted.

1. Section 7121(a), which authorizes Closing Agreements, and Section 7121(b), which provides for their finality, have existed without substantial change since the enactment of Section 606 of the Revenue Act of 1928, ch. 852, 45 Stat. 791.[6] It is not disputed that the Closing Agreements in this case were duly made and duly approved pursuant to Section 7121(a). Therefore, pursuant to Section 7121(b)(2), in the absence of fraud, malfeasance or misrepresentation (none of which exists in this case), the plain command of the statute is that no court "in any suit, action, or proceeding" may "annull[ ], modif[y], set aside, or disregard[ ]" "such agreement, or any determination, assessment, col-

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[5] None of the cases relied on by petitioners to establish a conflict among the circuits concerned Closing Agreements or the finality provisions of Section 7121(b).

[6] Somewhat similar provisions were enacted as Section 1312 of the Revenue Act of 1921, ch. 136, 42 Stat. 313; Section 1006 of the Revenue Act of 1924, ch. 234, 43 Stat. 340; and Section 1106 of the Revenue Act of 1926, ch. 27, 44 Stat. 113. See G.C.M. 74, V-2 C. B. 102 (1926).

lection, payment, abatement, refund, or credit made in accordance therewith." 26 U.S.C. 7121(b)(2).

It can not be questioned that this is a "suit, action, or proceeding." It is equally clear that petitioners seek to disregard, annul and set aside the "determination"[7] of their tax liability and the "payment" they made to extinguish that liability as provided under the terms of their Closing Agreements. By its explicit terms, Section 7121(b)(2) thus denies petitioners the recovery that they seek.

The plain and direct command of this statute has been followed in a longstanding and unbroken line of decisions which hold, under a variety of circumstances, that the finality provisions of Section 7121(b)(2) deny recovery of taxes and interest paid pursuant to the provisions of Closing Agreements. *Lincoln* v. *United States*, 356 F.2d 145 (Ct. Cl. 1966); *Commissioner* v. *Security Flour Mills Co.*, 135 F.2d 165, 168-169 (10th Cir. 1943), aff'd, 321 U.S. 281 (1944); *Wolverine Petroleum Corp.* v. *Commissioner*, 75 F.2d 593 (8th Cir.), cert. denied, 295 U.S. 743 (1935); *Perry* v. *Page*, 67 F.2d 635 (1st Cir. 1933), cert. denied, 292 U.S. 632 (1934); *Hering* v. *Tait*, 65 F.2d 703 (4th Cir. 1933); *Dubinsky* v. *Becker*, 64 F.2d 601 (8th Cir. 1933); *Aetna Life Ins. Co.* v. *Eaton*, 43 F.2d 711 (2d Cir.), cert. denied, 282 U.S. 887 (1930). As the court stated in *Wolverine Petroleum* (75 F.2d at 596):

> The policy of establishing the finality and conclusiveness of closing agreements once effected, except upon a showing of fraud or malfeasance or misrepre-

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[7] The Closing Agreements contain "determinations" of tax liability within the meaning of Section 7121(b)(2). See Treas. Reg. § 1.1313(a)-2:

> A determination may take the form of a closing agreement authorized by Section 7121. Such an agreement may relate to the total tax liability of the taxpayer for a particular taxable year or years or to one or more separate items affecting such liability. A closing agreement becomes final for the purposes of this section on the date of its approval by the Commissioner.

> sentation of a material fact, has proven efficacious in encouraging compromise of troublesome tax matters. To allow the finality of such agreements to be impeached upon grounds other than those enumerated in [Section 7121(b)] would tend to dimish the salutary effects of the statute.

Because petitioners' claims fall outside the clear exceptions to finality that are expressly established under the statute, the court properly denied petitioners' claims in this case.

2. The provisions of Section 7121(b) that provide finality for Closing Agreements supplement, and are not inconsistent with, other administrative provisions of the Internal Revenue Code. Petitioners emphasize (Pet. 33) that Section 6201(a) provides that the Secretary "is authorized and required to make * * * assessments of all taxes (including interest * * *)," but they pass over the fact that the same provision continues "which have not been paid * * * at the time and in the manner provided by law." Assessment is not the only method of collecting taxes. See 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.1, at 111-89 (1981). As this Court has more than once had occasion to point out, the government may also collect taxes by bringing suit for taxes owed. *Billings* v. *United States*, 232 U.S. 261, 286-287 (1914); *United States* v. *Chamberlin*, 219 U.S. 250 (1911). The Internal Revenue Code recognizes this fact by providing in Section 6501(a), in addition to a statute of limitations for assessments, a statute of limitations for the initiation of any "proceeding in court without assessment for the collection of such tax." 26 U.S.C. 6501(a).

As this Court pointed out in *Bull* v. *United States*, 295 U.S. 247, 259 (1935), "some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumen-

tality for the purpose is an administrative agency whose action is called an assessment." Assessment serves as the beginning point, not the conclusion of the process of collecting taxes. See *id.* at 260. An assessment must be issued before a lien may be imposed upon the taxpayer's property (Sections 6321 and 6322), and before a levy on the property of the taxpayer may issue for collection of unpaid taxes (Section 6331). But an assessment is not final. While it enjoys a presumption of correctness, its correctness is open to challenge in a suit for refund of previously assessed taxes or in a suit by the government to reduce an assessment to judgment. See 14 J. Mertens, *Law of Federal Income Taxation* § 49E.47 (1987).

Assessment serves the purpose of ascertaining the government's view of the amount it claims is due (see *Bull* v. *United States*, 295 U.S. at 259)—a purpose that is equally well served, and with greater finality, when the government institutes suit to reduce a claimed tax liability to judgment. The same purpose is also served, with the complete finality prescribed by Section 7121(b), by a Closing Agreement. The procedure for reaching a Closing Agreement is intentionally made "cumbersome and time consuming" (Rev. Rul. 60-287, 60-2 C. B. 188, 189) so that both the government and the taxpayer may thoroughly explore, evaluate, and define the agreement to be reached. It is therefore not supportable to say, as the district court did in this case (Pet. App. B31-B32), that the government has an obligation further to examine or audit the taxpayers' returns after a Closing Agreement has been duly executed and approved. Rather, as the court of appeals correctly observed, there was "no indication of nor for that matter purpose in, the Ewings conditioning their agreement [to pay their admitted tax liability] on a timely assessment" (Pet. App. A24).

It is true, as the regulations recognize (Treas. Regs. § 301.7121-1(d)(2)), that if a taxpayer, after entering into a

duly approved Closing Agreement, fails to fulfil his obligations and pay the taxes agreed upon, the Internal Revenue Service may then assess the unpaid taxes in order to make available the administrative remedies for collection. But the Closing Agreement itself has defined the taxpayer's obligations, and with finality. If those obligations are fulfilled by payment, as they were in this case, there is neither need nor occasion for assessment.

The court of appeals thus correctly ruled that the payments made by the taxpayer in 1984 under the terms of the Closing Agreement were not subject to refund. There is no conflict among the courts of appeals with respect to the circumstances presented in this case. Further review by this Court is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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